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No. 89-742

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Petitioner,

v.

CARROLL F. YOUNGBLOOD,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether the retroactive application of a law that does not punish as a crime an act previously committed, which was innocent when done; that does not make more burdensome the punishment for a crime, after its commission, and that does not deprive one charged with crime of any defense available according to law at the time when the act was committed, violates the *Ex Post Facto* Clause, Article I, §10 of the United States Constitution.

2. Whether the retroactive application of a purely procedural change in the law--pursuant to which a state appellate court is allowed to reform a judgment in a criminal case to delete an unauthorized punishment--violates the *Ex Post Facto* Clause.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Disposition Below 3

B. Statement of Facts 5

1. Facts Adduced at Trial 5

2. Facts Giving Rise to Youngblood's Claim 6

SUMMARY OF ARGUMENT 7

ARGUMENT 8

THE RETROACTIVE APPLICATION OF ARTICLE 37.10(b) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION 8

A. Retroactive application of Article 37.10(b) does not violate the Ex Post Facto *Clause because it does not punish as a crime an act previously committed, which was innocent when done; does not make more burdensome the punishment for a crime, after its commission, and does not deprive one charged with crime of any defense available according to law at the time when the act was committed* 11

B. The court of appeals incorrectly focused on whether Youngblood was deprived of an existing right by the retroactive application of Article 37.10(b) rather than whether it deprived him of notice 12

C. Because the change wrought by Article 37.10(b) did not deprive Youngblood of a substantial right, its retroactive application does not violate the Ex Post Facto *Clause* 15

1. The conclusion of the court below is contrary to this Court's precedent 16

2. The conclusion of the court below is contrary to the great weight of authority 18

3. "Substantial rights" should be defined as those enumerated in *Calder v. Bull* 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page**

Alabama v. Smith, ___ U.S. ___, 109 S.Ct. 2201 (1989) 21

Beazell v. Ohio, 269 U.S. 167 (1925) 10,17

Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc) 4,6

Bonner, In re, 151 U.S. 242 (1894) 16,17

Bouie v. City of Columbia, 378 U.S. 347 (1964) 13

Bozza v. United States, 330 U.S. 160 (1947) 16,17

Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798) . . . . . *passim*

Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867) 21

Dobbert v. Florida, 432 U.S. 282 (1977) 9,10,17

Evans v. Thompson, 881 F.2d 117 (4th Cir. 1989), *cert. pending*, No. 89-516 19

Gardner v. Florida, 430 U.S. 349 (1977) 16

Garland, Ex parte, 4 Wall. 333, 18 L.Ed. 366 (1867) 21

Hickman v. State, 548 S.W.2d 736 (Tex. Crim. App. 1977) 4

Hopt v. Utah, 119 U.S. 574 (1884) 10

Johnson, Ex parte, 697 S.W.2d 605 (Tex. Crim. App. 1985) 6,7

Kring v. Missouri, 107 U.S. 221 (1883) 14,21,22,23

Lindsey v. Washington, 301 U.S. 397 (1937) 20

Marks v. United States, 430 U.S. 188 (1977) 13

Medley, In re, 134 U.S. 160 (1890) 20

Miller v. California, 413 U.S. 15 (1973) 13

Miller v. Florida, 482 U.S. 423 (1987) 9,10,13,16,20

Murphy v. Massachusetts, 177 U.S. 155 (1900) 16

Ohio v. Johnson, 467 U.S. 493 (1984) 22

Pickens v. State, 730 S.W.2d 230 (Ark. 1987), *cert. denied*, 484 U.S. 917 (1988) 19

Poland v. Arizona, 476 U.S. 147 (1986) 22

Rooney v. North Dakota, 196 U.S. 319 (1905) 9

State v. Norton, 675 P.2d 577 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) 14,18,19

Thompson v. Utah, 170 U.S. 343 (1898) 21,22,23

Weaver v. Graham, 450 U.S. 24 (1981) . . . 9,10,13,14,20

Williams v. Florida, 399 U.S. 78 (1970) 23

Constitutions, Statutes and Rules

U. S. Const. Art. I, §10, cl. 1 2,8

28 U.S.C. §1254(1) 2

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1989) . . . . . *passim*

Tex. Penal Code Ann. §12.32(a) (Vernon Supp. 1979) 13

Tex. Penal Code Ann. §12.42(c) (Vernon 1974) 13

Tex. Penal Code Ann. §21.05 (Vernon 1974) 13

Tex. Penal Code Ann. §22.021 (Vernon Supp. 1989) 13

Miscellaneous

Black's Law Dictionary 520 (5th ed. 1979) 8

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PETITIONER'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Petitioner, by and through his attorney, the Attorney General of Texas, and files this brief.[1]

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[1]For clarity, the Petitioner is referred to as "the state," and Respondent as "Youngblood." The original petitioner in this case, James A. Lynaugh, has been succeeded in office and, hence, his successor, James A. Collins, is substituted pursuant to Rule 35.3 of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing the district court's denial of habeas relief is attached to the petition for writ of certiorari as Appendix D. *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing *en banc* is attached as Appendix E. The opinion of the federal district court denying habeas relief is attached as Appendix C. *Youngblood v. Lynaugh*, No. TY-86-211-CA (E.D. Tex. Sept. 13, 1988). The opinion of the Texas Court of Criminal Appeals denying Youngblood's state habeas application is attached as Appendix B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state convicting court recommending that habeas relief be granted is attached as Appendix A. *Ex parte Youngblood*, No. 7-81-102.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I, §10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1989) provides as follows:

> If the jury assessed punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Youngblood pursuant to a judgment and sentence of the 7th District Court of Smith County, Texas, in Cause No. 7-81-102-A, styled *The State of Texas v. Carroll F. Youngblood*. On March 17, 1982, Youngblood was convicted on his plea of "not guilty" of the first-degree felony offense of aggravated sexual abuse. Youngblood pled "true" to a prior conviction alleged for enhancement of punishment (SF II 299),[2] and the court in-

[2] "R." refers to the federal record on appeal by page number; no joint appendix was prepared in this case, and the appendices attached to the petition are referred to as "App." A, B, etc.; "SF" refers to the statement of facts of Youngblood's trial, and "Tr." refers to the transcript.

structed the jury that the proper punishment was "confinement in the Texas Department of Corrections for life or for any term of years not less than fifteen (15) nor more than ninety-nine (99). In addition, you may assess a fine not to exceed $10,000.00." (Tr. 27). The jury assessed punishment at life imprisonment and a fine of $10,000.00.

Youngblood's conviction was affirmed in an unpublished opinion delivered by the Twelfth District Court of Appeals of Texas on August 13, 1984. *Youngblood v. State,* No. 12-82-0050-CR. He then filed an application for state writ of habeas corpus challenging his conviction and sentence. The state convicting court, relying on *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc), found that Youngblood was entitled to a new trial because the judgment contained a fine which was unauthorized by state law (App. A).[3] On October 16, 1985, the Texas Court of Criminal Appeals delivered an opinion in which it found that the fine was not authorized by law, and--acting pursuant to Article 37.10(b) of the Texas Code of Criminal Procedure, which became effective June 11, 1985--reformed the judgment to delete the fine. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (en banc) (App. B).

On June 23, 1986, Youngblood filed an application for writ of habeas corpus in federal district court alleging that the retroactive application of Article

[3]Texas law at the time of *Bogany* allowed the appellate court to reform a sentence where punishment had been assessed by the court but not, as in Youngblood's case, where the jury had assessed punishment. *Hickman v. State*, 548 S.W.2d 736, 737 (Tex.Crim.App. 1977).

37.10(b) to his case violated the *Ex Post Facto* Clause (R. 52-69). Without requiring a response from the state, the district court summarily dismissed Youngblood's federal writ (R. 51). On November 5, 1986, Youngblood filed a motion to reconsider, and the district court withdrew its previous order and set a hearing to hear arguments on the issues raised by Youngblood (R. 28). After the hearing the state filed a motion to dismiss for failure to exhaust state remedies and an answer (R. 15-25). On September 13, 1988, the district court denied the state's exhaustion motion and also denied habeas relief, finding that the retroactive application of Article 37.10(b) does not violate the federal constitutional prohibition against *ex post facto* laws (App. C 5-6). Youngblood appealed, and on September 8, 1989, the court of appeals reversed, concluding that there had been an *ex post facto* violation (App. D 10). On October 19, 1989, the court of appeals denied the state's suggestion of rehearing *en banc* (App. E). On December 11, 1989, the Court granted the state's petition for writ of certiorari.

B. Statement of Facts

1. Facts Adduced at Trial

The state presented evidence at the guilt-innocence phase of trial that Youngblood, wielding a knife, abducted a 20-year-old married woman from her home (SF II 118-40). He forced his victim to drive to a secluded spot where they parked for four hours while he fondled her and performed oral sodomy on her; Youngblood also forced his victim to perform oral sodomy on him, and he ejaculated into her mouth (SF II 144-57).

Upon returning to the victim's home, she and Youngblood were seen by the victim's husband and

brother, who gave chase (SF II 159-61). The chase ended with the victim's car crashing head-first into a police car, breaking her jaw and knocking out four of her teeth (SF II 165-66). Youngblood did not testify or present any evidence (SF II 258-59).

2. Facts Giving Rise to Youngblood's Claim

On June 11, 1985, Article 37.10(b) of the Texas Code of Criminal Procedure became effective. That statute provides that when a jury verdict assesses both a punishment that is authorized by law and one that is not, the trial court shall reform the verdict, and if the trial court fails to do so, "the appellate court shall reform the verdict as provided by this subsection." Prior to the enactment of Article 37.10(b), a verdict which contained an unauthorized punishment required reversal of the conviction and an entire new trial on both guilt-innocence and punishment. *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc). The *Bogany* Court had reasoned that an entire new trial was required because it lacked authority to change the verdict rendered by the jury. *Id.* at 959.

The first case to come before the Court of Criminal Appeals following the passage of Article 37.10(b) was *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), in which the court applied the statute to reform a verdict and judgment pronounced in 1980 in which an impermissible fine had been imposed in addition to a term of incarceration. The *Johnson* court rejected the petitioner's *ex post facto* claim, reasoning as follows:

> Since the amendment does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature. Thus, in the absence of express legislative intent to the contrary, the new law controls litigation from its effective date and applies to both pending and future actions. *See Wade v. State*, 572 S.W.2d 533 (Tex.Cr.App. 1978), and cases cited therein at 534. See also *Patterson v. State*, 650 S.W.2d 453 (Tex.App. - Houston [14th] 1982). We must therefore follow the Legislature's mandate and reform that portion of the verdict unauthorized by law.

Id. at 607-08. The Court of Criminal Appeals, relying on *Johnson*, similarly reformed the judgment in Youngblood's case. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (App. B 2).

SUMMARY OF ARGUMENT

The decision of the court below is an incorrect interpretation of prior decisions of this Court. The retroactive application of Article 37.10(b) does not violate any of the established tests for resolving *ex post facto* claims. It does not punish previously innocent conduct, increase the potential punishment after commission of the offense or deprive Youngblood of a defense. Moreover, there was no *ex post facto* violation because Youngblood was not deprived of "fair warning" by the application of the statute to his case.

There is no question that the change in law wrought by Article 37.10(b) was procedural in nature, and it cannot be earnestly contended that Youngblood

was deprived of a substantial right by its application to his case. Where, as here, the defendant receives a fair trial and the only error present affects solely the sentence, there is no "right" to a second trial.

By defining "substantial rights" as the types of harm listed in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), the Court can eliminate confusion as to the distinction between procedure and substance and as to which rights are "substantial." Strict adherence to the *Calder* test will provide a readily understood standard that can be easily applied.

ARGUMENT

THE RETROACTIVE APPLICATION OF ARTICLE 37.10(b) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

> **EX POST FACTO LAW**. A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. By Const. U. S. art. 1, §10, the states are forbidden to pass "any *ex post facto* law." In this connection the phrase has a much narrower meaning than its literal translation would justify . . . .

Black's Law Dictionary 520 (5th ed. 1979). The constitutional proscription against such laws serves two purposes: to prevent legislative abuses and to ensure that legislative enactments "give fair warning of

their effect and permit individuals to rely on their meaning until explicitly changed." *Miller v. Florida*, 482 U.S. 423, 429-30 (1987), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981). As is apparent from the law dictionary definition, two critical elements must be present for a law to be unconstitutionally *ex post facto*: "[I]t must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 429; *see Dobbert v. Florida*, 432 U.S. 282, 292 (1977) ("ameliorative" changes in the law do not offend the Constitution); *accord, Rooney v. North Dakota*, 196 U.S. 319, 325 (1905). Whether these two elements exist is merely the initial inquiry, however, given the more restrictive meaning of the phrase in the constitutional sense.

The characteristics of an *ex post facto* law -- the sorts of legislative abuses and deprivation of fair warning against which the clause was designed to protect -- were first recognized by the Court nearly two centuries ago in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), and since have been restated many times:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925), quoted in *Dobbert*, 432 U.S. at 292; *accord, Miller*, 482 U.S. at 429. Even if a law operates to a defendant's disadvantage, the clause does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert*, 432 U.S. at 293, quoted in *Miller*, 482 U.S. at 433; *Hopt v. Utah*, 119 U.S. 574, 589-90 (1884). It is only when a "substantial right" is altered that the retrospective application of a procedural law change may be held *ex post facto*. *Miller*, 482 U.S. at 433, citing *Weaver*, 450 U.S. at 29 n.12.

While two of the three members of the panel of the court below that decided this case were unable to completely reconcile the Court's *ex post facto* jurisprudence,[4] it is clear that Youngblood cannot prevail under any of the Court's decisions. Moreover, an analysis of the Court's precedent on this subject reveals that -- with two exceptions, which provide no succor to Youngblood -- the cases can be read in

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[4]If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses--nevertheless run afoul of the clause, I fear that the Supreme Court's decisons offer little guidance for distinguishing among such procedural cases.

Jones, concurring (footnote omitted) (App. D 12).

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

Gee, concurring (App. D 10).

harmony to provide a workable test that will obviate the uncertainty experienced by the court below.

A. Retroactive application of Article 37.10(b) does not violate the* Ex Post Facto *Clause because it does not punish as a crime an act previously committed, which was innocent when done; does not make more burdensome the punishment for a crime, after its commission, and does not deprive one charged with crime of any defense available according to law at the time when the act was committed.

The opinion of the court below did not find, nor could it, that Article 37.10(b) is constitutionally infirm under the time-honored test of *Calder v. Bull*. Instead, the court below applied a different analysis:

Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he

> previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

(App. D 8). The Fifth Circuit's approach does not comport with prior decisions of this Court for two reasons: first, because it does not consider whether Youngblood was deprived of fair warning by application of the statute to his case and, second, because it greatly enlarges the class of rights that might properly be characterized as "substantial."

B. *The court of appeals incorrectly focused on whether Youngblood was deprived of an existing right by the retroactive application of Article 37.10(b) rather than whether it deprived him of notice.*

The initial flaw in the approach of the court below is that it attaches entirely too much significance to whether prior law accorded Youngblood a "right" to an entire new trial.

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the

> legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver, 450 U.S. at 30; *accord, Miller*, 482 U.S. at 430. To the same effect are this Court's decisions invalidating retrospective judicial decisions, a type of due process violation that is analytically indistinguishable from *ex post facto* laws. *See, e.g., Marks v. United States*, 430 U.S. 188, 195 (1977) (retrospective application of pornography standards of *Miller v. California*, 413 U.S. 15 (1973), deprived petitioners of "fair warning"); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964) (petitioners not given "fair warning" of unforeseen judicial construction of trespassing statute).

Here, Youngblood was put on notice at the time he decided to violate the sanctity of another citizen's home and person that his actions could render him criminally liable for the offense of aggravated sexual abuse, Tex. Penal Code Ann. §21.05 (Vernon 1974),[5] which they did. He likewise was put on notice that if he were found guilty of this offense, he could be sentenced to a term of imprisonment ranging from five years to 99 years or life. Tex. Penal Code Ann. §12.32(a) (Vernon Supp. 1979). Finally, he was on notice that because he previously had been convicted of a felony, he could be sentenced to a term of imprisonment ranging from 15 years to 99 years or life. Tex. Penal Code Ann. § 12.42(c) (Vernon 1974).

Although the court below did not consider whether Youngblood was deprived of "fair warning" by application of the statute to his case, it cannot seriously

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[5]This offense now is proscribed by Tex. Penal Code Ann. §22.021 (Vernon Supp. 1989).

be argued that he was. The penal statutes in effect at the time of the offense were sufficient to apprise him of the criminal sanctions to which he exposed himself by virtue of his felonious actions, and it would be nothing more than baseless speculation for him to assert that he would have acted differently had he known that an unauthorized punishment might have been assessed and that he then would have received a new trial. An asserted lack of fair warning cannot, as a matter of simple logic, be premised on such a contingency. *See Kring v. Missouri*, 107 U.S. 221, 239 (1883) (Matthews, J., dissenting, ("[I]t does not follow that such a contingency would have happened."); *State v. Norton*, 675 P.2d 577, 586 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) ("the *ex post facto* clause does not prevent the State from depriving a criminal defendant of an expectation as to a defense or procedure that has not yet accrued to his benefit."). Youngblood's case stands in stark contrast to *Weaver* and *Miller*, where the petitioners' punishments were effectively increased subsequent to the commission of their crimes, thereby denying them fair warning.[6]

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[6]In addition to failing to consider whether Youngblood was deprived of fair warning, the court below also considered it unimportant whether the statute in question constitutes a "legislative abuse," which it clearly does not.

> We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow consideration of public policy to interfere with the central inquiry

(Footnote continued on next page)

C. Because the change wrought by Article 37.10(b) did not deprive Youngblood of a substantial right, its retroactive application does not violate the Ex Post Facto *Clause.*

Because the procedural nature of Article 37.10(b) is unquestioned, even by the court below (App. D 6), and because its retroactive application did not run afoul of the test of *Calder v. Bull* or deprive Youngblood of fair warning, the only issue that the Court must resolve in order to decide this case is whether Youngblood was deprived of a "substantial right." In answering this question in the affirmative, the court below concluded that the prior state law right must have been substantial for two reasons: because Article 37.10(b) was enacted to abolish it (App. D 8-9) and because "given the universal references in the *ex post facto* jurisprudence to such concepts as 'material disadvantage' and substantial 'protection,' we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered 'substantial.'" (App. D 9).

The Fifth Circuit's analysis is wholly unpersuasive. Under the first rationale for its finding of substantiality, any change in the law that

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(Footnote continued from previous page)

> before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

(App. D 9 n.2).

disadvantages a defendant necessarily will lead to the conclusion that the right of which he has been deprived should be classified as "substantial." A presumptively valid state court criminal conviction should not be overturned on the basis of such circular reasoning.

1. The conclusion of the court below is contrary to this Court's precedent.

The second rationale of the court below is pure *ipse dixit* and at odds with both the record in this case and the basis for the state law rule that obtained prior to the enactment of Article 37.10(b). "Although the distinction between substance and procedure might sometimes prove elusive," *Miller*, 482 U.S. at 433, the Court's decisions do shed some light on this question. It long has been recognized that an unauthorized punishment does not entitle a defendant to outright release on habeas corpus or an entire new trial; instead, the proper remedy is correction of the sentence. *Bozza v. United States*, 330 U.S. 160, 166 (1947); *In re Bonner*, 151 U.S. 242, 259-60 (1894).

> In this case it was on account of error in the sentence as originally imposed that that sentence was set aside. All the proceedings prior thereto stood unimpugned, and the Superior Court merely rendered the judgment which should have been rendered before.

Murphy v. Massachusetts, 177 U.S. 155, 157 (1900). *See also Gardner v. Florida*, 430 U.S. 349, 362 (1977) ("Petitioner's conviction, of course, is not tainted by the error in the sentencing procedure.").

Youngblood's case is no different. Here, as in *Bonner*, *Murphy* and *Bozza*, the guilt-innocence phase of trial was error-free. The court below found the right to a whole new trial to be substantial because "the outcome might be different the second time around . . . ." (App. D 8). Whatever validity that view might have in some other context, it has none in this case. The evidence against Youngblood was not just overwhelming--it was conclusive as to his guilt. The defense offered *no evidence*, and the record is devoid of any basis on which another jury might have reached a different result than did Youngblood's first jury.

No constitutional objective is served by requiring the states to grant criminal defendants not one, but two, fair trials. Texas caselaw before the enactment of Article 37.10(b) was based on nothing more than the state appellate court's recognition of its lack of authority to reform a jury verdict and had no foundation in the Constitution or traditional notions of equity and fairness. Further, as discussed, *supra*, at 4 n.3, the rule applied only in cases where a jury had assessed punishment. Moreover, it is far from clear that prior Texas law necessarily was beneficial to defendants such as Youngblood. For instance, had Youngblood received a 15-year sentence and an unauthorized fine and been granted a new trial, he could have been sentenced to life imprisonment upon retrial. Thus, the "right" of which he was deprived can only be characterized as "limited and insubstantial." *Beazell v. Ohio*, 269 U.S. at 171. To find an *ex post facto* violation in this case "mocks the substance of the *Ex Post Facto* Clause." *Dobbert*, 432 U.S. at 297.

2. The conclusion of the court below is contrary to the great weight of authority.

The Fifth Circuit's finding of a constitutional violation on the facts of this case stands alone in *ex post facto* jurisprudence. In at least three capital cases courts have rejected *ex post facto* challenges to the retroactive application of statutes that are indistinguishable in principle and, in fact, more onerous than that involved in the case at bar. In *State v. Norton*, 675 P.2d 577 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984), the defendant obtained a reversal of his death sentence due to error in the sentencing phase. Utah law at the time of the offense provided for a mandatory life sentence in the event of such error. While Norton's appeal was pending, the legislature repealed that statute and enacted a new one that provided for a new sentencing proceeding with the potential for a new death sentence. The Utah Supreme Court held that application of the new statute to Norton's case was not *ex post facto* because it was merely procedural and, at the time it was passed, no "right" to a life sentence had accrued to Norton. *Id.* at 586. The *Norton* court found analogous the federal cases upholding extended statutes of limitations:

> While the defendants in the foregoing cases had an *expectancy* that the periods of limitation in effect when they committed their crimes would apply, the *ex post facto* clause did not preclude legislative extension of those periods where the expectancy had not accrued into a perfected defense before the amendment took effect. Thus, the defendants were not deprived of a right or a defense; they were merely deprived of an expectancy.

Id. (original emphasis). To the same effect are *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989), *cert. pending*, No. 89-516, and *Pickens v. State*, 730 S.W.2d 230, 235 (Ark. 1987), *cert. denied*, 484 U.S. 917 (1988), where the retroactive applications of similar statutes allowing the state to seek the death penalty on retrial were upheld as not *ex post facto*.

Youngblood's case differs only in that the application of Article 37.10(b) actually inured to his benefit in that the jury verdict was reformed to delete an unauthorized punishment. Unlike the defendants in *Norton, Evans* and *Pickens*, Youngblood was not put in the position of facing a potential death sentence on retrial. If those defendants' "right" to a life sentence upon reversal was not deemed substantial, *a fortiori*, Youngblood's "right" to an unwarranted and unnecessary retrial likewise cannot be so characterized.

3. "Substantial rights" should be defined as those enumerated in *Calder v. Bull*.

The elusive distinction between substance and procedure need not be drawn in order to determine whether the retroactive application of a particular law violates the *Ex Post Facto* Clause. A much more workable test is simply to inquire whether any of the concerns listed in *Calder v. Bull* are implicated. By applying such a test, courts could confidently rely on a bright-line rule that would obviate the uncertainty experienced by the court below as to what should be classified as a substantial right. In addition, such a test is, for the most part, entirely consistent with the Court's decisions.

In the majority of cases in which the Court has found an *ex post facto* violation, it would have done so under the *Calder* standard. Thus, in *In re Medley*, 134 U.S. 160 (1890), it was held *ex post facto* to retroactively apply a statute calling for solitary confinement prior to execution of a death sentence, when prior law did not. Addition of the condition of solitary confinement increased the punishment beyond that in effect at the time of the offense.

Similarly, in *Lindsey v. Washington*, 301 U.S. 397 (1937), the retroactive application of a statute that provided for a mandatory sentence of fifteen years was struck down because it deprived defendants of the benefit of prior law, which provided for a range of punishment. Although the *Lindsey* Court was of the opinion that it "need not inquire whether this is technically an increase in the punishment annexed to the crime," *id.* at 401, it is clear that the statute did in fact effectively increase the potential punishment by eliminating the possibility of a sentence less than the maximum. *Medley* and *Lindsey* fit neatly within the framework of *Calder v. Bull*.

More recently, in both *Weaver v. Graham* and *Miller v. Florida*, the Court found a constitutional defect in the retroactive application of changes in the law that increased the amount of time prisoners must serve before achieving eligibility for parole. In both cases, the Court recognized that the change in law effectively added to the punishment that was prescribed at the time when the crime was consummated. *Miller*, 482 U.S. at 433-34; *Weaver*, 450 U.S. at 33. Again, the results reached are in harmony with *Calder*.

The court below was of the opinion that

Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867) and *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1867), support its conclusion that Youngblood's case should be decided under a standard other than *Calder* (App. D 8). In fact, those cases stand for the opposite proposition. Both *Cummings* and *Garland* involved loyalty oaths following the War Between the States, with the exclusion from certain professions the penalty for failing to take the oaths. In finding that requiring the oaths violated the Constitution, the Court held that exclusion from one's chosen vocation constitutes "punishment" within the meaning of the *Ex Post Facto* Clause. *Cummings, id.* at 318, 18 L.Ed. at 361; *Garland, id.* at 377, 18 L.Ed. at 370. Thus, the holdings in those cases are fully consistent with the test of *Calder*.

The only decisions of this Court that cannot be reconciled with *Calder* are *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898). In *Kring*, the law at the time of the offense and trial provided that a conviction of second-degree murder acted as an acquittal of the greater offense of first-degree murder. Kring initially pled guilty to second-degree murder and was sentenced to twenty-five years imprisonment, but succeeded in having the conviction reversed on appeal. By the time he was tried again, Missouri law had been changed to allow the state to seek a conviction for first-degree murder and a sentence of death. The Court held that retroactive application of the new law to Kring's case was *ex post facto* because it deprived the defendant of a valid defense and effectively increased his punishment. *Id.* at 229.

The validity of *Kring* is questionable in light of subsequent decisions of this Court. *See, e.g., Alabama v. Smith*, ___ U.S. ___, ___, 109 S.Ct. 2201, 2206 (1989) (no constitutional impediment to imposing greater

sentence on retrial than first sentence imposed in connection with guilty plea); *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (where conviction is reversed, slate is wiped clean, and defendant may be sentenced to any lawful punishment); *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (acceptance of guilty plea to lesser included offense does not constitute an "acquittal" of greater offense for double jeopardy purposes). Given the current state of the law, it would seem that Kring had no right -- much less a "substantial" right -- to an implied acquittal.

Even if *Kring* remains good law, however, it avails Youngblood nothing. The decisive distinction between *Kring* and the case at bar is that the defendant in that case entered into a plea agreement pursuant to which he would receive an acquittal of a capital offense. Thus, at least at the time of his plea, if not the commission of his offense, he relied on Missouri law as then in force. Youngblood is unable to demonstrate similar reliance to his detriment. The determinative event in the legal proceedings against Youngblood is that his jury imposed a punishment that it was without authority to assess. This fortuity was wholly outside Youngblood's control and entirely unforeseeable. Thus, neither at the time of the offense nor at trial could Texas law as it then existed have entered into Youngblood's thinking process. There was no lack of fair warning, no detrimental reliance and, hence, no *ex post facto* violation.

Thompson v. Utah is of even more questionable precedential value. There, state law was changed between the defendant's first and second trials to provide for eight-member juries rather than the traditional twelve persons. The *Thompson* Court held that retroactive application of the eight-member jury rule was *ex post facto* because "the jury referred to in

the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less." *Thompson*, 170 U.S. at 349. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court rejected the notion that the constitutional right to a jury embraces the numerical requirement of twelve jurors. Although the Fifth Circuit was of the opinion that *Thompson v. Utah* remains viable in light of *Williams* (App. D 7 n.1), the state is unable to understand how that could be. In any event, *Thompson* offers Youngblood no support. The constitutional right to trial by jury never has been interpreted to embrace a right to two fair trials.

This case provides an opportunity for the Court to clarify its prior *ex post facto* decisions. Strict adherence to the venerable test of *Calder v. Bull* will provide a standard that can be readily applied and easily understood. Reliance on such a rule will obviate grappling with such slippery questions as substance as opposed to procedure and which rights are "substantial." Finally -- with the possible exceptions of *Kring* and *Thompson v. Utah* -- the *Calder* test does not mandate a different result than under any other approach that the Court has employed.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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